

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 24, 2011

In the Matter of M.P., Minor.

No. 298705
Kent Circuit Court
Family Division
LC No. 07-050273-NA

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to the minor child, M.P., based on MCL 712A.19b(3)(a)(ii)(desertion), MCL 712A.19b(3)(c)(i)(conditions that led to adjudication continue to exist), MCL 19b(3)(g)(failure to provide proper care and custody), and MCL 712A.19b(3)(1)(prior termination of parental rights). We affirm.

I

The minor child M.P. came under the jurisdiction of the court in January 2007 while respondent was being held in Kent County jail awaiting extradition to Mississippi, to serve a sentence for a probation violation.¹ On March 7, 2007, respondent, then incarcerated in Mississippi, participated by telephone in a "contested adjudication/disposition/termination" hearing. At that hearing, she entered a plea of admission to the petition, at which time a request for termination of her rights was withdrawn; the goal was reunification with the most suitable parent. Respondent remained incarcerated in Mississippi and not present by telephone for the next three dispositional review hearings, which took place in June, August, and November, 2007. At these hearings, it was established that respondent had a bond with M.P., that she was regularly and consistently in contact with him and the caseworker by letter, that the caseworker was attempting to arrange for services during respondent's incarceration, and that respondent took part in a parenting class during her incarceration and was receiving psychotropic medications.

¹ M.P.'s father was under a "no contact" order due to an instance of domestic violence involving M.P. He has since established a positive relationship with M.P. and his parental rights have not been terminated. He is therefore not a party to this appeal.

The caseworker intended to arrange for services as soon as possible upon respondent's return to Michigan.

Respondent was released before the next hearing, a permanency planning hearing held on January 14, 2008. However, she remained in Mississippi and was not scheduled to return to Michigan until February. At the hearing, it was reported that respondent had kept up weekly letters and, since her release, had engaged in weekly telephone calls with M.P. She was seeking services while in Mississippi and the caseworker planned on an immediate evaluation upon her return to Michigan so as to determine and arrange for needed services.

Respondent returned to Michigan on February 9, 2008, and was present at the next permanency planning hearing, held on April 15, 2008. She was engaged in services and was seeking stable housing. She also had attended supervised weekly visitation with M.P.

At the July 16, 2008, permanency planning hearing, it was reported that respondent had failed to complete a psychological evaluation or parenting classes, and that she had not yet demonstrated sufficient improvement in her parenting skills to permit M.P. to be returned to her care. Consequently, with respondent's concurrence, M.P. was placed in permanent foster care. Thereafter, M.P., respondent, and M.P.'s father signed a permanent foster care agreement. Nevertheless, given M.P.'s bond with both his father and respondent and the fact that they were making progress, it was believed that a continued relationship would be in M.P.'s best interests. However, Respondent then began missing visitations and counseling sessions due to transportation problems. Her last visit with M.P. was in December 2008. In February 2009, respondent returned to Mississippi without telling M.P. or the caseworker that she was leaving. M.P. was upset and hurt. Thereafter, except for one letter in December 2009, respondent had no contact with M.P. M.P. had been addressing his relationship with respondent in counseling, which included frustration with the lack of contact and abandonment feelings. He had expressed in counseling that he wanted respondent's parental rights terminated. By the end of January 2010, a termination hearing was scheduled.

The termination hearing was held on May 6, 2010, fifteen months after respondent voluntarily returned to Mississippi and seventeen months after her last visit with M.P. At the termination hearing, a caseworker testified that she spoke with respondent after the January 2010 hearing and advised that if she wanted to avoid termination, she should renew contact with M.P. either in person or by letter. She did not do so. The caseworker believed that a failure to terminate would cause emotional stress for M.P. M.P.'s counselor testified that termination would mean closure for M.P.; a chance to move out of the foster care system and solidify the relationship with his foster family if a guardianship were allowed; a chance to lessen involvement of agencies in his life; less worry about what was going on with respondent and the prospect of her "coming back and trying to plan for him again"; and less talk by family members about respondent. M.P.'s counselor concluded that in M.P.'s mind, the threat of respondent trying to get him back would loom. M.P. testified consistent with this assessment.

The trial court found that the statutory grounds for termination were established, and found by "clear and convincing evidence, and particularly through [M.P.'s] own statements," that it would be in M.P.'s best interests if respondent's parental rights were terminated.

II

Respondent first argues that the order terminating her parental rights must be vacated because she was not present by telephone at the three dispositional review hearings held while she was incarcerated in Mississippi. In *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), our Supreme Court affirmed an incarcerated respondent's right to participate by telephone at every phase of a child protective proceeding pursuant to MCR 2.004. However, MCR 2.004 provides that when a "party is incarcerated under the jurisdiction of the Department of Corrections," the court "shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference" As noted, respondent was incarcerated in Mississippi and was not under the jurisdiction of the Michigan Department of Corrections. In *In re BAD*, 264 Mich App 66, 71-76; 690 NW2d 287 (2004), this Court specifically held MCR 2.004 addresses only parties incarcerated under the jurisdiction of the Michigan Department of Corrections, and therefore, it does not apply to parents incarcerated outside the State of Michigan. Accordingly, plaintiff was not entitled to the benefit of this rule.

Even if the opportunity to participate afforded by MCR 2.004 were applicable to incarcerated parties generally, unlike the respondents in *In re Mason*, 486 Mich 142, and *In re Kleyla*, ___ Mich App __; ___ NW2d __ (Docket No. 294776, issued July 15, 2010), there is little basis for concluding that respondent's absence at the dispositional review hearings had a bearing on the outcome of this case.² The stated goal at the time of these hearings was reunification with the most suitable parent. Efforts were being made to investigate services available while respondent was incarcerated and to begin providing services in Michigan as soon as possible. Moreover, nothing adverse to respondent occurred at these three hearings or at the two subsequent hearings after her release from prison. The first arguably adverse action following the hearings attended by respondent was M.P.'s placement in permanent foster care, an action in which respondent concurred by way of entering into the permanent foster family agreement. In *In re Kleyla*, ___ Mich App at __, the Court indicated that lack of participation in preliminary hearings would be a basis for invalidating the termination of parental rights because the initial hearings influenced what transpired at the subsequent hearings. In the present case, that is merely a theoretical construct. Plaintiff's voluntary absence from M.P.'s life, the event that led to termination, came about after the hearings that occurred while she was incarcerated. Thus, under the unique facts of this case, any deprivation of respondent's due process rights caused by the failure to afford respondent an opportunity to participate telephonically in the three hearings at issue was harmless error.

Respondent next argues that termination of respondent's parental rights was not in M.P.'s best interest.

² In *In re Mason*, 486 Mich at 166, the Court indicated that it did "not reach the question whether reversal could be independently required under a due process analysis."

Appellate courts are obliged to defer to a trial court's factual findings at termination proceedings if those findings do not constitute clear error. We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest. A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. [*In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009) (citations and quotation marks omitted)].

We conclude that the trial court did not clearly err by terminating respondent's parental rights.

Preliminarily, respondent's argument conflates the reasonable efforts requirement and the best interests of the child determination. Reasonable efforts to reunify are required by MCL 712A.19a(2), which provides in pertinent part:

The court shall conduct a permanency planning hearing within 30 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required. *Reasonable efforts to reunify the child and family must be made in all cases* except [in certain enumerated circumstances.] [Emphasis added.]

Reasonable efforts must be made *before* there is a permanency planning hearing. Here, the permanency plan was in place and, thus, reasonable efforts *to reunify* were not at issue.

Respondent argues that reasonable efforts should have been made to assist her and M.P. in resolving their differences because this would have been in M.P.'s best interests. The best interests determination requirement is set forth in MCL 712A.19b(5), which provides:

If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.

This statute provides that the court is to look at what is in the child's best interest, not what might be in the child's best interest if the potentiality exists that something might change. The trial court's disregard of this consideration was not error.

Respondent takes issue with the court's reliance on the counselor's testimony in its decision to terminate her rights because the counselor apparently kept no records of her sessions with M.P. Respondent does not point to any case that restricts a psychologist or other counselor from testifying based on the failure to adequately document sessions.

In finding that termination of parental rights was in M.P.'s best interest, the court referenced M.P.'s testimony. As respondent notes, M.P. was motivated in part by perceived consequences of the determination that might or might not come to fruition, and by hurt and anger. Respondent maintains this should not be a basis for termination of her parental rights. However, the evidence indicates that M.P.'s wishes also reflected a desire for stability. There was testimony that his emotional stability would be adversely affected by a decision not to

terminate. Given that respondent severed the bond with M.P. by voluntarily disappearing from his life for approximately seventeen months, we conclude that there was no clear error in the trial court's determination that M.P.'s emotional well-being would be served by terminating respondent's parental rights, and that termination of those rights was in his best interest.

Finally, we note that, in the Statement of Questions Involved section of her appellate brief, respondent raises a fourth issue regarding whether the trial court properly evaluated M.P.'s placement with her in the future because "incarceration alone is not grounds for termination." However, respondent presents no argument in her brief in support of that issue. Moreover, since there was a permanent foster care agreement signed by respondent, placement with her after her release from prison was never at issue. For those reasons, we decline to address this issue further.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering